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Developing Causal Doctrine

MARTIN HOGG

I. Introduction

Though the focus of this chapter will be on causal doctrine in Scots law, it is important to begin by stating emphatically that there is nothing peculiar about the Scottish legal system which requires it to use a special test of causation different from that employed in other legal systems, whether common law, civilian or mixed. Causation is one of those aspects of private law where comparative analysis is readily applicable, and where ‘legal transplants’ are to be welcomed, especially given that the small size of the Scottish jurisdiction means that litigation suitable for developing causal doctrine occurs relatively infrequently. That does not mean, however, that there is nothing interesting or distinctive to say about the Scottish doctrinal position on causation: on the contrary, as the following discussion attempts to show, there is.

It is also important to add that the discussion which follows is confined to the law of delict, and largely to what may be called causation in fact (or causation *simpliciter*, if one prefers, though questions of terminology are given a fuller discussion below).

II. The Current Scottish Doctrinal Position on Causation

A general assessment of causation in delict cases indicates that Scottish judicial thinking has been largely unaffected by recent academic writing in the field. Scottish courts still conceive of causation in the terms expounded by Hart and Honoré,¹ that is as a unified doctrine comprising the two component elements of factual and legal causation. Factual causation, it is said, tests whether something caused or contributed to an injury, while legal causation tests whether something which qualifies as a factual cause is deemed significant enough to attract liability at law.

In terms of factual causation, courts recognise the basic test as that of *sine qua non* (or ‘but for’), to be applied by asking whether, in the absence of the defender’s behaviour, the damage complained of would still have occurred. If it would not, then the defender’s behaviour is considered a factual cause of the damage. Such a test identifies causes which were necessary for an injury’s occurrence. In addition to this basic test of necessity, there is said to be a second, alternative test, the so-called material contribution test, which asks whether, without being a necessary cause of an injury, a factor nonetheless contributed to the injury. In fact, this alleged second test is really just as a gloss on the *sine qua non* test, because it simply clarifies that, in order for *sine qua non* causation to be demonstrated, it is not necessary that the pursuer, *P*, demonstrate that the defender, *D*, caused the totality of the harm suffered by *P*: rather it is sufficient for *P* to demonstrate that *D* ‘materially contributed’ to the harm by having been a ‘but for’ cause of a not insignificant portion of the totality of the harm. That courts do in practice recognise material contribution as a gloss on the *sine qua non* test may be seen from any one of a number of uncomplicated reported cases of divisible injury (those where different elements of the overall harm sustained, or

¹ HLA Hart and T Honoré, *Causation in the Law*, 2nd edn (Oxford, Oxford University Press, 1985).

different degrees of its severity, may be separated out)—cases which therefore do not raise difficult questions of indeterminacy or duplicate causation (as to which, see further below) or indivisible injuries. Courts often express the causal enquiry to be undertaken in such simple cases as an investigation of whether the defender’s behaviour ‘caused or materially contributed’ to the outcome, indicating that the identification of either a sole cause or a contributing cause of an injury will be sufficient to establish causation in fact. Such, for instance, was the stipulated enquiry in the recent case of *Kerr v Stiell Facilities Ltd*,² an industrial injury claim in which the pursuer suffered a minor injury at work while moving heavy machinery with some colleagues. The judge in the case, Lord Hodge, expressed the causal enquiry to be ‘whether it has been established that the accident caused or materially contributed to the pursuer’s long term pain and debility’,³ holding on the facts that the defender’s negligence had ‘triggered’ the chronic pain syndrome from which the pursuer suffered and was thus properly considered as a factual cause of that injury.

It used also to be the case, until *Barker v Corus (UK) plc*,⁴ that Scots law employed the idea of ‘material contribution’ in a further way, such usage being that established in the Scots appeal *McGhee v National Coal Board*,⁵ a usage which held that to have materially increased the risk of an injury occurring was equivalent to having materially contributed to the injury. This conflation was a wholly fictional one, given that a consideration of any case where a risk is created but no injury occurs is sufficient to demonstrate that mere risk creation is *not* the same thing as causing an

² [2009] CSOH 67.

³ Para [82].

⁴ [2006] UKHL 20, [2006] 2 AC 572.

⁵ 1973 SC (HL) 37, 1973 SLT 14.

injury. The illogicality entrenched by the *McGhee* decision bedevilled the law for some considerable time, the resulting mess not being resolved until the *Barker* decision redefined materially increasing the risk of an injury as meaning causing the loss of a chance of avoiding the injury.⁶ This redefinition restored a degree of orthodoxy to the law, though it has meant that Scottish courts have now reverted to a position where they essentially have only the *sine qua non* test, fleshed out with the material contribution gloss, to rely upon when testing causation in fact. The problems for a legal system's relying solely on such a test are notorious, *sine qua non* being unable adequately to deal with cases of overdetermined outcomes (eg two simultaneously operating causes either of which alone would have caused the injury) or indeterminate outcomes (those where it cannot be shown which of a number of possible causes was in fact the operative one). The frequently published criticisms of academics about the lack of a test sufficient to deal with such cases have as yet failed to spur the judiciary to action. It is a fruitless endeavour seeking to identify a single reported Scots judgment of recent years where the court has referred to academic writing on the subject of causation. If, for instance, one types in 'Stapleton' to the Scottish Courts database of reported cases,⁷ three references come up to Professor Stapleton's writing, but none of them are to her published writing on causation; if one

⁶ Subsequently, as a result of the enactment of s 3 of the Compensation Act 2006, 'material increase in risk' was restored as a test of causation for mesothelioma (not merely the loss of a chance of avoiding mesothelioma), and thus continues to operate as a test of causation in relation to that restricted class of injury. See, for recent application of the test in a case of mesothelioma, the decision of the Supreme Court in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 11, [2011] 2 WLR 523.

⁷ www.scotcourts.gov.uk/opinionsApp

types in ‘NESS’, one will find many references to Loch Ness, but none to the NESS test of causation (as to which, see further below).

In terms of judicial appreciation of academic writing on so-called ‘legal causation’, Scotland is even further behind. To recap, traditionally courts have talked of something being a legal cause of an injury if, in addition to its having been shown to be a ‘but for’ cause of that injury (whether by virtue of being a necessary or contributing cause), it is considered to have been a significant or important cause of the injury. Such significance or importance has been tested by asking whether it was a proximate cause or a *causa causans* (a ‘causing cause’), an enquiry sometimes answered in the negative by a finding that its ‘causal potency’ was overwhelmed by a later cause considered to be more significant in the chain of events (a so-called *novus actus interveniens*). Such language suggests that the issue being tested is properly part of the causal enquiry, an approach favoured in the writings of Hart and Honoré. However, recent academic writing has tended to argue that adopting such causal language when attempting to assess the significance of causes masks the fact that what is going on is a normative exercise, one in which courts are applying often unspoken policies in determining whether or not they believe that causes *ought* to attract liability. It has been argued by a number of the leading commentators in the field that it would be more honest to use explicitly normative language for this exercise, recognising that it has nothing to do with the type of exercise being undertaken when assessing so-called factual causation, and to replace the language of

‘legal causation’ with that of the ‘scope of liability for consequences’, dropping in the process the old language of *causa causans* and *novus actus interveniens*.⁸

Such academic attempts to abandon the obscurantist language of legal causation in favour of more honest and accurate language have, however, thus far failed to impact upon Scottish judicial thinking. Courts routinely continue to employ the traditional terms in their decisions. This unwillingness to employ the new academic thinking seems somewhat puzzling given recent excellent and wide-ranging engagement by courts with academic writing in other fields. What is different with causation? The impression is given that Scottish courts are perhaps a little intimidated by causation, perceiving it as a complex issue to be glossed over whenever possible. Perhaps more problematic for the academic community, however, is the sense that part of the judicial reticence to refer to and employ new academic doctrinal thinking stems from the fact that, as with the subject of error in contract law, there are still too many competing theories and classifications of causation, often expressed in highly complicated ways, to give the judiciary sufficient confidence to abandon established modes of thinking in favour of something new. If that is part of the problem, then it behoves the academic community both to agree new terminology and to explain that terminology in a way which shows it to be practicable and uncomplicated, a matter which is discussed further below.

⁸ See eg, J Stapleton, ‘Cause-in-fact and the scope of liability for consequences’ (2003) 119 *LQR* 388; J Stapleton, ‘Legal cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 *Vanderbilt Law Review* 941; J Stapleton, ‘Unpacking Causation’ in P Cane and J Gardner (eds), *Relating to Responsibility* (Oxford, Hart Publishing, 2001); R Wright, ‘Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility’ (2001) 54 *Vanderbilt Law Review* 1071; M Hogg, ‘The Role of Causation in Delict’ 2005 *Juridical Review* 89.

III. The Future Doctrinal Development of Causation in Scots LawThe above comments indicate that development of Scottish causal doctrine is desirable. What form should such development take? The following suggestions are offered as part only of such desirable development; not every possible development is touched upon. The suggestions are largely linked by three causal issues requiring attention if doctrine is to develop in a helpful way: (1) the appropriate test for causation; (2) the appropriate terminology to be employed; and (3) the understanding of what properly falls to be considered part of causation and what ought to be put in to a different legal box (a matter which also clearly affects issue (2)).

A. Accepting that Causation has a Legally Specific Content

Preceding the legal development of causal doctrine should be an acceptance of the idea that, for the purposes of legal enquiry, causation can and ought to mean precisely what lawyers decide it should mean. This point—arguing for a context-specific understanding of causation—has been developed in much greater detail by others, especially Professor Stapleton,⁹ so it is unnecessary to repeat it in detail here. It is worth making here again even briefly however, because causal theorists can too often agonise as to whether their attempts at exposition of doctrine measure up to some supernatural concept of causation. A good start to sensible doctrinal development would be an acceptance that we should not be hampered by a belief that there is some holy grail of causation, a platonic and pan-disciplinary understanding of that concept which we must struggle to discover and distil. For lawyers, just as ‘duty’ and

⁹ See, most recently, J Stapleton, ‘Choosing what we mean by “Causation” in the Law’ (2008) 73 *Missouri Law Review* 434.

‘damage’ mean what we decide they should mean in a legal context, so it should be with the concept of causation. What counts as a sufficient causal connection for the purposes of the law is quite properly a decision to be taken with legal considerations in mind. The fact that particle physicists or surgeons may have a different understanding of causation, employed quite properly for their own purposes, should not worry lawyers, even though they will wish to be aware of such different understandings, not least when expert witnesses from other disciplines are giving evidence before a court.

B. Reforming Causal Terminology and Agreeing the Content of the Causal Enquiry

Any sensible development of doctrine must include reform of the causal terminology employed by courts and the legal profession. Reference has already been made to the growing academic consensus that the traditional language of factual and legal causation should be abandoned, with those matters traditionally lumped under the latter heading being recognised as normative issues having no relation to causation properly understood (but rather referred to as ‘matters affecting the scope of liability for consequences’).¹⁰ Additionally, consideration should be given to whether it remains desirable to utilise the term ‘causation in fact’ (which in academic circles has come to replace the previously preferred ‘factual causation’) to refer to causation as it operates in the real world. While some jurisdictions have already adopted the language of ‘causation in fact’ (the mixed legal jurisdiction of Louisiana being one

¹⁰ See the literature referred to at n 8 above.

example)¹¹ an alternative approach would be to talk of ‘causation’ *simpliciter*. Such an approach has recently found favour with, amongst others, Professor Stapleton and Lord Hoffmann, though, in the case of the latter, rather than using ‘causation’ to refer merely to the factual exercise embodied in the *sine qua non* or NESS tests,¹² his Lordship would bring within ‘causation’ *simpliciter* many of the normative and policy issues that, it has been argued here, ought *not* to be considered as touching on causation properly understood.

Settling on an agreed causal terminology is crucial to developing doctrine: the words we use give form to the underlying theory being conveyed. While there is probably no fundamental objection to dropping ‘causation in fact’ in favour simply of ‘causation’, such a development would be a sensible one only, it is suggested, if it were to be clearly understood that the term ‘causation’ *simpliciter* did *not* include those matters traditionally dealt with under so-called ‘legal causation’, ie the normative issues relevant to deciding which causes in the real world ought to attract liability. The counterargument, employed by Lord Hoffmann, is that courts are often compelled to consider everything relevant to the determination of a case under a single, composite head of causation, and that one cannot therefore exclude normative issues from the causation box. An example where it is argued that this is so would be the case where a statute imposed liability on persons causing dangerous drugs to be administered to another. In considering whether A, who passed a syringe containing heroin, to another, B, who injected it and then died of a drug overdose was liable

¹¹ Scots and Louisiana causal thinking have recently been compared in M Hogg, ‘Causation as an element of delict/tort in Scots and Louisiana law’ in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh, Edinburgh University Press, 2009).

¹² As to the NESS test, see further below at II.C.

under the relevant statutory provision, how else (it is said) is a court to introduce consideration of the normative issue that it was the free decision of *B* which appears to have been determinative of *B*'s death, other than giving an appropriate (and restricted) meaning to the word 'cause' in the statute?

Just such an issue arose for determination by the House of Lords in *R v Kennedy*,¹³ where the statute in question made it an offence to 'administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person'.¹⁴ The conundrum this creates for the content of the concept of causation stems from the drafting of the provision in question. Parliament has chosen a wording which forces both issues of causation in fact and matters affecting the scope of liability for consequences into the interpretation of the single statutory term 'cause'. Such drafting makes the issue of causation seem as if it is an interpretative exercise into which one might properly bring consideration not just of real world causal questions but also matters which, in a common law case, might happily be treated separately as normative ones affecting liability for consequences (in this case, the consideration that the defendant's behaviour had been superseded by the voluntary and freely undertaken conduct of the victim). This impetus to consider these two separate enquiries together is, however, a mere seeming, created by the specific statutory word in question here. The statutory word at issue in another case might just as easily be the word 'kill', the word 'boil', or the word 'release'. In none of those cases would the word at issue also denote a stage in the delictual equation (duty + breach + causation + harm – defence = liability), so in none of those cases would we think we had hit upon an argument against separating

¹³ [2007] UKHL 38, [2008] 1 AC 269. The case is discussed by Lord Hoffmann in ch 1 of this volume.

¹⁴ Offences against the Person Act 1861, s 23.

normative matters out of causation. What this suggests is that the fact that the term requiring interpretation in *Kennedy* was ‘cause’ should not lead us to believe that causation *as a delictual concept* (rather than as, in this case, a statutory term requiring to be interpreted) should incorporate both the counterfactual exercise inherent in tests of causation as well as normative questions. The answer to the ‘*Kennedy* objection’ to separating out causation proper from factors affecting the scope of liability for consequences is thus to consider what we would think if the relevant statutory wording in the case had not been ‘administer to or cause to be administered to’ but rather, say, ‘administer to or facilitate the administration to’: replacing the word ‘cause’ with another term, as the parliamentary draftsman might have done to achieve the same end, would rob the ‘*Kennedy* objection’ to keeping causation free from normative considerations of its apparent force. Unfortunate statutory wording is not a valid argument against restricting the concept of causation to real world, factual questions.

One further point about causal terminology is worth making. In Professor Stapleton’s most recent writing on causation, she has argued that the term ‘involvement’ merits use as an umbrella term for explaining the idea of causation as it operates in a legal context. Involvement, as she conceives it, encompasses those factors which are either (1) necessary for; (2) ‘duplicately necessary’ for (meaning operating as one of a number of causes of an overdetermined outcome); or (3) ‘contribute’ to an outcome (contribution essentially covering any NESS condition other than one which is a simple *sine qua non* cause or a duplicately necessary cause). ‘Involvement’ so defined has the merit of being an accessible term, which might be less productive of causal anxiety in the minds of judges. On the other hand, its use may not make the causal debate that much simpler. Why not? Well, ‘involvement’ is

arguably a somewhat imprecise term. People talk of being 'involved' in things, in a legal context, in quite a wide variety of different ways. For instance, someone might describe himself as being 'involved' in the process of government by virtue of his exercise of his legal right to vote in an election, but we would not therefore think that that meant he had caused any of the individual policies and actions implemented by the government he helped to elect. So, there may be a concern that using the word 'involvement' could give rise to too wide a notion of causal connection, and that it might conceivably start to lead us back to relying on 'common sense' in deciding if a factor is 'involved' in an outcome. Moreover, 'involvement' is also arguably no more than a synonym for causation, in that to ask 'Was A involved in outcome X?' appears to be simply a restatement in different terms of the question 'Did A cause X?'. The former interrogative merely employs a less causal sounding term. So it might be questioned whether we really need to employ this additional idea of involvement to explain causation. These minor criticisms of Stapleton's latest view are however essentially semantic: in substance we both agree, as we do with the leading American causal theorist, Richard Wright, that the NESS test provides a good basis for developing the law.

If there is largely an academic consensus about what direction, in substance, legal development should take, the terms employed in the causal debate by different academics do still, however, require to be reconciled. We have gone from talking of factual causation, to causation in fact, and now perhaps to involvement, in the space of only a few years. It is crucial for the academic community to try to agree terms, or else it is going to be difficult to persuade the courts to abandon their traditional, flawed classificatory language, given that judges will be unsure as to which proposed new terminology to adopt. The settlement of this terminological issue is, moreover, as

the foregoing comments on the Hoffmann view show, not simply a question of linguistic preference, but also a matter of convincing judges about what should go in to the causal box and what should go in to other boxes. On that matter, we are still some way from a resolution.

C. A New Test of Causation

Further development of causal doctrine should also be based upon an acceptance that the present reliance by the courts on the ‘but for’ test, with its material contribution gloss, cannot continue. Given the inability of *sine qua non* to deal with common causal difficulties, such as duplicate causation, a new and more comprehensive test needs to be adopted by the courts. Such a more comprehensive test has been developed within the academic community, winning wide acceptance as the best alternative to the *sine qua non* test. The test in question will be familiar to academics (but few practising lawyers) as the NESS test, known in such an acronymic form because of its identification of all factors preceding an outcome which were *necessary elements* of a set of conditions sufficient for the outcome to occur (the italicised letters combining to form the acronym). This test, while it contains an element of necessity within it, locates that necessity element within a larger consideration of a set of conditions sufficient for an outcome (thus rightly recognising that there can be more than one set of conditions capable of producing, and thus being sufficient for, a specific outcome).

Despite courts and practising lawyers tending to view NESS as very complicated to apply, it is not. Its application can be explained relatively simply as follows:

Assemble a set of all the conditions which preceded an outcome (eg conditions A, B, C, D, E). If you want to see whether one condition—let's say it is A—was a cause of the outcome, remove any conditions from the set which were not required for the outcome to occur, eg if the outcome would still have occurred without D and E, they are removed. At this point a set of conditions (A, B, C) will be left which was minimally sufficient for the outcome to occur, ie all the conditions in the set were required on this occasion to produce the outcome. Removing the condition in question, A, will therefore produce a set of conditions which is no longer sufficient for the outcome to occur. A is thus held to have been a cause of the outcome.

This improves on the *sine qua non* test because it allows us to identify duplicate causes as each having been a cause of an outcome. So, if two vehicles *V1* and *V2* each struck a pedestrian crossing the road, killing him, and the medical evidence is that each blow on its own would have been fatal, while application of the *sine qua non* test results in the bizarre conclusion that neither vehicle caused the accident (because the impact of the other vehicle would have caused the death in any event), the NESS test correctly identifies each vehicle as a cause. The three conditions present in the set which preceded the death of the pedestrian are: (1) the impact of *V1*, (2) the impact of *V2*, and (3) the presence of the pedestrian, *P*, on the road. If one wants to see if *V1* is a cause of *P*'s death, one removes *V2* from the list of conditions and one still has a set minimally sufficient for the outcome; however removing *V1* means one no longer has such a set, so *V1* was a cause of the death. The same result is reached if one separately tests *V2* as a possible cause using the NESS test: *V2* is also shown to be a cause of the death. NESS also works to allow proper identification of what can be styled 'pre-emptive' causes, such causes being those which, through their supervening operation, prevent another condition which would have resulted in an outcome from achieving that effect. Thus, negligent exposure of an employee to a

fatal dose of radiation, which exposure would have resulted in the employee's death several months later, is not identified as a cause of death if the employee is killed by a lightning strike one week later: the lightning strike is identified using NESS as the (pre-emptive) cause of the death. This is so because the set of conditions minimally sufficient for the death of the employee from the radiation exposure are: (1) the radiation exposure, and (2) the employee affected by it. If the employee is no longer in existence (having been killed by lightning), then this set of minimally sufficient conditions cannot exist. This of course is not to say that the employer's conduct cannot be a cause of the pain and suffering caused between the point of exposure to the radiation and death (indeed such conduct can be shown to be such a cause), but so putting matters identifies a different harmful outcome in relation to which causation is being tested: rather than the death of the employee, we are testing for causes of his pain and suffering up to the point of death.

This is not the place to explain further the application of the NESS test, as that has been done elsewhere in much greater detail.¹⁵ However, even this brief explanation indicates, it is hoped, that the NESS test provides a largely comprehensive algorithm for testing causation. It adequately deals, as briefly shown above, with both duplicate and pre-emptive causation, and it can also correctly identify omissions to act as causes in appropriate cases (ie in those cases where a failure to act is properly identified as a possible cause because there was a duty to act in the circumstances). It cannot, however, deal with indeterminate causation (about which, see further below), but then no test of causation is capable of doing that.

¹⁵ See ch 14 of this volume. See also, for instance, R Wright, 'Once More into the Bramble Bush' (n 8); J Stapleton, 'Choosing what we mean by "Causation" in the Law', (n 9); M Hogg, 'The Role of Causation in Delict' (n 8).

Despite its improvement upon the simple and inadequate *sine qua non* test, the NESS test has yet to be taken up by the Scottish or English courts. This does appear largely to be so because courts perceive it to be complex and impractical (possibly because academics are apt to choose fanciful examples when demonstrating its application, like that of the infamous poisoned desert traveller). Yet the NESS test can be presented in a concise and not overly complex way, as it is hoped it has been here, thereby demonstrating its practicability and utility to the courts.

D. Mapping Cases of Causal Uncertainty

No test for causation developed to date has been able to provide a satisfactory answer in cases of indeterminate causation, that is in those cases where removing a condition from the set of conditions preceding an outcome fails to produce a clear answer to the question whether one is left with a minimally sufficient set for the outcome still to occur. Such cases of indeterminate causation are not infrequent, common examples being personal injury cases where the cumulative effect of exposure to chemical or other agents cannot be broken down into individual causal effects (often because medical science has not yet determined the aetiology of the medical condition in question) or where too much time has passed since the injury to determine the causal impact of the various possible conditions on the patient's present state. Indeterminacy also has the potential for arising in cases involving the uncertainty of human decision-making, such as those where what is at issue is what a pursuer would have chosen to do in the absence of the defender's negligence. In cases such as these, courts may be faced with whether to, and if so how to, allow a pursuer to overcome an evidentiary gap created by such inherent causal uncertainty in order to allow his claim to succeed, a course of action which requires the deployment of non-causal solutions to achieve

the desired result. At the present time, this area is rapidly developing, and the law requires to develop a clearer understanding of which circumstances will justify the overcoming of an evidentiary gap by employment of a non-causal solution, and what the specific solution ought to be in the type of case in question.

An interesting question is whether one might comprehensively map all of the different types of indeterminate case and provide a coherent taxonomy explaining why certain solutions are thought appropriate in certain types of case, but others require different solutions. No such grand enterprise can be attempted here, but it is intended directly below to select one particular type of inherent causal uncertainty—that of the inherent unpredictability of human behaviour—to see whether a consistent and coherent approach can at least be developed in all cases of that type.

The prospect that a rational and comprehensive map of the whole area of causally uncertain cases might be produced is, for those working within a jurisdiction like Scotland—which conceives of private law as capable of being comprehensively mapped—a desirable, and one would hope achievable, one, though one which will have to await further research and exposition.

E. A Case Study of Causal Uncertainty: the Assessment of Counterfactual Human Decision-making

As a final suggested development of causal doctrine, consideration is given below to one specific area of causal uncertainty, that being cases where the causal uncertainty relates to the inherent unpredictability of human behaviour. Discussion is restricted to cases where what is at issue is how a person would have behaved in the past in the absence of the defender's negligence. Judicial development in this area is ongoing,

though the various solutions adopted by courts in different types of case can give the appearance of a somewhat piecemeal approach.

i. The Nature of the Indeterminacy Problem as it Relates to Human Behaviour

How does the unpredictability of past human behaviour create causal problems? The difficulty is that, when one has to consider how a pursuer would have behaved in the past in the absence of the defender's negligence, there may be uncertainty as to which imaginary, alternative set of facts to postulate, or, to put it in causal terms, as to which counterfactual world to postulate when testing causation using the NESS algorithm. This of course assumes that one *does* use counterfactual analysis with NESS, which is taken here as a given. However, at least one leading NESS scholar, Professor Wright, disputes this.¹⁶ He argues that, in applying NESS, one merely removes the condition being tested, while leaving all the others unchanged.¹⁷ That is a workable approach with simple causal sets where, having removed one condition, it does not seem fanciful to leave the others as they are. A good example of such a simple causal set, proposed by Chris Miller,¹⁸ is the electrical circuit, where, if one has a set minimally

¹⁶ See ch 14 of this volume. See also R Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 *Iowa Law Review* 1001.

¹⁷ So Wright, explaining his position, states: 'We hypothetically eliminate only the condition being tested ... from the sufficient set of actual antecedent conditions. Then, without adding or subtracting any other conditions, we determine—by matching the remaining conditions in the set against the applicable causal generalization—whether the set still would be sufficient for the occurrence of the result'. ('Causation, Responsibility, Risk, Probability, Naked Statistics and Proof' (n 16) 1041).

¹⁸ See C Miller, 'NESS for beginners' (ch 15 of this volume) XXX.

sufficient to produce light comprising (1) a switch, (2) a battery, and (3) a bulb, then removing, say, the battery, from the set, one can simply leave the other members of the set (the switch and the bulb) as they are in order to test whether light is still produced (which, we know, it is not). One can just about see how counterfactualism need not be a necessary part of such an exercise, though it is surely the case that most of us, when considering this example, are still conjuring up an image of a world in which the battery is absent in order to imagine what the outcome would be. Indeed, conjuring up such counterfactual worlds is surely the way that most judges go about thinking what would have happened in the absence of a defender's wrongdoing. However, in any event, if one goes beyond simple examples like the electrical circuit, and moves on to cases involving human decision-making, it seems impossible not to posit counterfactual scenarios: in the absence, for instance, of *D*'s negligent misrepresentation, it does not make sense to leave unchanged the remaining condition (*P*'s detrimental actings in reliance on the misrepresentation), as that condition only exists in that form as a result of the now absent misrepresentation. Without the misrepresentation, the other condition would not have existed in the form in which it did, so that simply eliminating the misrepresentation but leaving the other condition unchanged makes no sense.

These examples bring home the point that, in anything other than the simplest types of case (and even perhaps for those), one has to use counterfactual analysis in order to test causation using NESS. But that brings us back to the difficulty that there will be cases where there is more than one such counterfactual world which might reasonably be posited, thus posing the dilemma of *which* such world to posit. Thus there arises the problem of multiple conceivable parallel universes beloved of science fiction writers.

The root of the problem is that all counterfactual behaviour of human beings is indeterminate—we cannot know how someone would have behaved if we change the other surrounding factors—or at least what may be called ‘quasi-indeterminate’¹⁹, that is to say it is not able to be determined given the current state of human knowledge. As we are not omniscient beings (and not likely to become so in the immediate future), we do not possess that intimate knowledge of the complexity of individual human decision-making which would allow us to determine how a particular victim would have behaved in the absence of a particular wrongdoer’s negligent conduct. Does this mean therefore that all cases involving questions about how people would have behaved are treated by courts as indeterminate and thus unable to be solved by applying the NESS algorithm, given that the NESS test presupposes that we are able to input a given counterfactual world against which to apply the test? Certainly not. In practice, courts regularly treat many cases as if it can be determined how someone would have acted in the past, albeit that this deemed determinability is in strict terms a fiction. Courts in fact often take it for granted that we can prove, on the balance of probabilities, how someone would have behaved. Take, as an example, the Scottish case of *Keith v Davidson Chalmers*.²⁰ The pursuer claimed that the defenders, a firm of solicitors, had been negligent in failing to advise him that, were he to undertake a transaction he was contemplating, this would result in his being in breach of a fiduciary duty owed to a company of which he was a director and employee, and his thereby incurring liability towards that company. He sued the defenders for the amount for which he had had to settle such a claim by the company against him. On appeal, the Inner House of the Court of Session upheld the decision at first instance

¹⁹ On quasi-indeterminacy, see H Reece, ‘Losses of Chance in the Law’ (1996) *MLR* 188.

²⁰ 2004 SC 287, 2003 SCLR 941.

that the pursuer had failed to show that he had suffered any loss as a result of the defender's breach of duty, stating that in a case such as this the pursuer had to prove

what he would have done had he been given the correct advice at the material time. In the present case he would undoubtedly have aborted the entire operation. This is a clear and unequivocal finding by the Lord Ordinary which was not satisfactorily challenged at the appeal. In these circumstances the pursuer has wholly failed to prove that he has suffered any real loss arising out of the transaction in respect of which the advice should have been tendered.²¹

The causal process in *Keith v Davidson Chalmers* was treated as if it were deterministic: the court felt able to conclude what the pursuer would have done in the absence of the negligent conduct of the defender.²²

What, however, if the counterfactual behaviour of a particular party in the absence of the defender's negligent behaviour seems not to be determinable? Orthodox principles suggest that, in such a case, an ordinary damages claim by a pursuer for real world harm should not be allowed to succeed (although the case might conceivably be reframed as one of loss of a chance, an alternative solution touched on briefly below). Although there may be a temptation to skate over apparent problems of indeterminacy when drafting pleadings, such a temptation should be

²¹ Opinion of the Inner House, delivered by Lord Wheatley, at [29]. The pursuer had eventually been unable to proceed with the contemplated transaction. Instead, he was able to sell his interest in the company which he had set up to undertake the transaction for a much higher sum than the settlement he had had to pay in respect of his breach of fiduciary duty, thus resulting in his making a substantial net gain.

²² A similar case is that of *Leeds & Holbeck Building Society v Alex Morison & Co (No 2)* 2001 SCLR 41, where the Lady Ordinary (Paton) concluded that, had the defender properly warned the pursuer of risks relating to a third party, the pursuer would not have made a loan to such third party.

avoided. A bald averment in pleadings that claimed losses flow from the defender's negligent behaviour, without narration of how, may result in an otherwise sound case being dismissed for lack of specification of the claim. Such was the outcome in *Henderson v The Royal Bank of Scotland*,²³ where the pursuer averred simply that substantial damages flowed from the defender's misrepresentation, without saying how. The case was dismissed for lack of specification.

However, even in cases where, at first glance, the potential problem of the indeterminacy of a party's behaviour seems to arise, courts may be willing to employ one of a number of techniques to overcome the apparent indeterminacy. Such techniques are considered below in cases involving either the indeterminacy of the pursuer's or defender's behaviour.

ii. Potentially Indeterminate Behaviour of the Pursuer

So far as cases involving the potentially indeterminate behaviour of the pursuer's conduct is concerned, the problem can be exemplified by further consideration of misrepresentation claims, of which there have been a number of recent reported Scottish examples. In such cases, a court first needs to give proper consideration to the nature of the duty which the defender ought to be held to have come under: how this duty is framed will affect the losses which may conceivably be claimed as having flowed from the breach of such duty. Was the duty to provide information only, or was it to advise on a particular course of action? That important distinction was made by Lord Hoffmann in the *SAAMCO* case,²⁴ a distinction commented on further by the

²³ [2008] CSOH 146, 2008 SCLR 823.

²⁴ *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191.

House of Lords in *Aneco Reinsurance v Johnson & Higgins*,²⁵ and one which has been followed and applied in subsequent Scottish cases such as *Hamilton v Allied Domecq plc*,²⁶ *Preferred Mortgages v Shanks*,²⁷ and, most recently, in a case mentioned earlier, *Henderson v Royal Bank of Scotland*.²⁸ How a court frames the nature of the duty undertaken by the defender may exclude some potential counterfactual problems, as a particular type of loss to which a causal link seems to be indeterminate may in any event be excluded from the claim by virtue of its falling outside the scope of consequences covered by the duty in question.

Correct stipulation of the duty undertaken may not, however, solve all potential counterfactual problems in a misrepresentation case (or indeed in other types of case). Even given the permissible types of loss claimable by virtue of the nature of the duty in question, it may still be unclear what the pursuer would have done had the defender not made the misrepresentation on which the pursuer relied, because a number of alternative reasonable courses of action might then have been open to him and he cannot demonstrate which he would have adopted. In such cases, failure to demonstrate which course of action would have been taken by the pursuer will usually result in dismissal of the action.²⁹

²⁵ [2001] UKHL 51, [2001] 2 All ER (Comm) 929.

²⁶ The *SAAMCO* decision was cited in the judgments of both Outer and Inner Houses (see 2001 SC 89 (OH) and 2006 SC 221 (IH)), the House of Lords eventually holding that the defender had neither assumed any duty towards the pursuer nor made any misrepresentation to him.

²⁷ [2008] CSOH 23.

²⁸ [2008] CSOH 146, 2008 SCLR 823.

²⁹ Exceptionally a failure by *P* to state what he would have done will not be fatal to a claim, however. In *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134, a failure by *P* to say what she would have done absent *D*'s breach of duty did not preclude a successful claim by *P* against a doctor who had

iii. Potentially Indeterminate Behaviour of the Defender

In fact, misrepresentation claims may also give rise to questions of the defender's apparently indeterminate counterfactual behaviour: should a court counterfactually posit that the defender made no representation at all, or should a careful representation be posited? What if a number of careful representations might have been made by the defender, which one should be posited? For instance, if the careless information to invest in bad concern *X* were not given, thus avoiding *P* losing £50,000, should it be posited that *D* would instead have advised investment in gilts, or in property speculation, or in good, albeit differently performing, concerns *Y* or *Z*? A degree of assistance in such cases of apparent counterfactual indeterminacy has been provided by the judicial determination that one should counterfactually posit that the defender made a careful representation, rather than that no representation was made or treating the representation which was made as if it were accurate.³⁰ As a general approach, this commends itself logically: as the making of the representation was undertaken voluntarily, and it is the issue of whether or not the representation was given *carefully*, it seems correct as a general approach to posit a counterfactual

failed to warn her of the inherent risks of surgery when these risks materialised in injury. There is an ongoing debate among academics as to why the claimant in *Chester* was permitted to overcome uncertainty about her counterfactual behaviour when claimants in other types of case have not been so permitted, a debate largely the result of academic disagreement as to the ratio of the *Chester* decision (compare, for instance, M Hogg, 'Duties of Care, Causation and the implications of *Chester v Afshar*' 2005 *Edinburgh Law Review* 156 with J Stapleton, 'Occam's Razor reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 *LQR* 426).

³⁰ See Lord Hoffmann in *SAAMCO*, [1997] AC 191, 216D-E.

alternative where information *is* given carefully, rather than some other alternative. There may be exceptions, however. In a recent case, *Halifax Life Ltd v DLA Piper Ltd*,³¹ an owner of property sued for damages in misrepresentation on the basis that the defender, a firm of solicitors, made a successful offer to purchase commercial property for £8.8 million on behalf of a syndicate of buyers which, it transpires, did not in fact exist. On discovering this, the owners resold the subjects at a substantially reduced price. In such a case, how can one sensibly posit a careful counterfactual representation by the defender? It would have to be something like: ‘We hereby offer to purchase subjects on behalf of a non-existent client’. An offer framed thus is clearly nonsensical, and no such offer would ever be issued. Surely, in such a case, where the idea of a carefully issued offer seems nonsensical, it seems correct counterfactually to posit that, in the absence of negligence on the defender’s part, no offer would have been made at all; had that been so, the pursuers would have tried to sell the property to another buyer. They may be able to indicate a second potential buyer to whom the property would likely have been sold; if not, the circumstances might nonetheless be appropriate for a claim for loss of a chance, given that courts have been sympathetic to pursuers who cannot prove what a third party might have done in the absence of the defender’s negligence.³² Indeed, somewhat similar circumstances arose in an English misrepresentation case, *First Interstate Bank of*

³¹ [2009] CSOH 74. Following this reported judgment of Lord Hodge, the case was put out By Order to allow discussion of further procedure, but the claim was eventually settled extra-judicially.

³² See, for instance, the English cases *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602 and *Spring v Guardian Assurance plc* [1995] 2 AC 296.

California v Cohen Arnold,³³ in which a lost opportunity to sell a property for a higher sum was successfully pled.

iv. The Default Rule in Cases of Indeterminacy

As mentioned at the beginning of this section, the problem about the potentially indeterminate human behaviour arising in misrepresentation cases is that the NESS algorithm presupposes that we are able to input a given counterfactual world, but doesn't tell us how to choose between competing, reasonable counterfactual worlds. Although the NESS test can't help with this problem, the above discussion shows that, on some occasions, potential difficulties might be resolved through the nature of the duty in question or through the assumption that a careful representation was made (rather than some other assumption). However, where such solutions cannot provide an answer, then, approaching the problem as a matter of principle, the rule must be that a pursuer who claims that, absent *D*'s misrepresentation, outcome *X* would have prevailed should be required to demonstrate, on the balance of probabilities, that it is indeed *X* which would have prevailed, rather than some other outcome.³⁴ If *P* cannot

³³ [1996] 5 Bank LR 150, 140 Sol Jo LB 12, [1996] PNLR 17. Another type of misrepresentation case where arguably no representation ought counterfactually to be posited would be where it could be shown that the extra time and effort required to give information carefully would have put *D* off giving any information at all.

³⁴ For a recent example of a case where the pursuers were unable to discharge this burden of proof see *Blower & others v Edwards & Scottish Widows plc* [2010] CSOH 34, where the Lord Ordinary (Hodge) held that the pursuers had failed to demonstrate that their counterfactual behaviour in the absence of the alleged negligent advice of the defenders would have been any different to their factual behaviour.

do so, because it is equally or more likely that *Y* or *Z* would have prevailed, then *P*'s claim based upon outcome *X* must fail. The same will hold if it cannot be said that any particular counterfactual outcome would have prevailed. If, however, *P* can demonstrate, on the balance of probabilities, that *X* was more likely than not to have occurred, but this cannot be said of *Y* or *Z*, then *P*'s case alleging the losses arising from outcome *X* should succeed.

In applying this rule, and thus in deciding which of these outcomes is proven in any given case of misrepresentation, much will depend on assessing the credibility and reliability of the evidence presented to the court as to who would have done what. As to this point, it seems that courts view the matrix of facts which they are entitled to consider (for instance, what the previous business decisions and dealings of parties suggest about their likely counterfactual behaviour in the case before the court) to be a wide one. It also seems that, while courts expect *P* to be able to demonstrate what course of action he would have chosen absent the misrepresentation, they are more willing to infer which course of action *D* would have chosen if *D* pleads uncertainty as to what he would have done: a pursuer is not to be prejudiced, if at all possible, by pled uncertainties about the defender's counterfactual behaviour, given that this is a matter over which he has no control.

v. Road Traffic Accidents

The problems of potentially indeterminate human behaviour are not restricted to misrepresentation cases, though such cases do focus those problems most clearly. One further common type of problematic case relating to the counterfactual behaviour of a defender, a type previously discussed by both Professor Stapleton and me, is that of the pedestrian injured in a road traffic accident. Suppose a pedestrian to have been

struck by a driver in a hurry who was travelling at 50 mph in a 40 mph zone, and the pedestrian to have suffered certain injuries in consequence. In asking whether, had *D* not been negligent in what he did, would *P* still have suffered those injuries, is one counterfactually to posit that safe speed which *D* would most likely have driven at given his usual driving habits (perhaps he usually drives 10 mph below the limit), or should it be the speed which is the nearest careful speed to that at which *D* was actually driving? Or what if, if one takes *D*'s negligence out of the equation, *D* would not have been driving at all, because the evidence indicates that he always refuses to drive if he is made to stick within the speed limit—should one then posit a counterfactual scenario where *D* was not driving at all? Professor Stapleton has recently said that in such an example:

[t]he Law determines what would have been the highest speed a reasonable person would have been going in the circumstances, say 45 mph ... the defendant's behaviour is altered *just* enough to bring it into conformity with his duty as mandated by law, namely 45 mph.³⁵

The same approach was advocated by Becht and Miller in their 1961 work *Factual Causation*.³⁶ However, another alternative would be to posit the most likely alternative behaviour of *this defender* had he not been speeding. As suggested above, that might be shown to be 40 mph because, other than on this aberrant occasion, he invariably drove at 10 mph below the speed limit. Such an approach might be said to be more consistent with what the courts do when dealing with misrepresentation cases, where they posit not what reasonable parties would have done, but what *this*

³⁵ J Stapleton, 'Choosing what we mean by "Causation" in the Law' (n 9) 451.

³⁶ A Becht and W Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (St Louis, Washington University Publications Committee, 1961) 34.

defender and *this* pursuer would have done had the misrepresentation not been made. That is certainly what the Inner House of the Court of Session professed to be doing in the passage quoted earlier from *Keith v Davidson Chalmers*.

vi. Conclusion on Cases of Indeterminacy

What may one conclude from the above discussion of the potential problem of the indeterminacy of counterfactual human behaviour? First, it is important to recognise that courts have shown willingness to fashion solutions to some potential problems through, for instance, careful definition of the duty undertaken on the facts of the case, through a general (though not, it has been suggested, invariable) rule that, in misrepresentation cases, a careful representation should be posited rather than some other counterfactual scenario, and through application of lost chance analysis in certain cases. More work needs to be done in analysing and explaining why certain solutions (lost chance claims, for instance) will be available in some cases but not in others. Second, however, it remains clear that those framing pleadings are sometimes not sufficiently aware of the pitfalls which may arise. This lack of awareness may simply be the result of a failure to appreciate the importance of the counterfactual exercise which must be conducted when following through claimed losses to a demonstrable counterfactual outcome. If that is so, then greater willingness to attend to this exercise would benefit pleaders. Not all problems may be resolvable, but some might be with sufficient care and attention. Third, as the road traffic accident example shows, there remains an unresolved question as to whether, in considering different possible counterfactual worlds, one should be positing one in which the party or parties are supposed to have behaved as reasonable individuals—in which case, one would be, to some extent, ‘objectifying’ the issue—or whether one is trying to

determine what would have been the most likely alternative behaviour of the actual party or parties in question, in which case the counterfactual exercise has a more subjective element to it. An objective approach seems more suited to the issue of whether there has been a breach of a duty of care, where the standards of the reasonable person are in issue, but less suited to the application of counterfactual analysis, where one ought to be attempting to ascertain what the actual parties would have done (the exercise, after all, purports to be a factual one). A satisfactory resolution of this issue requires the clear adoption by the judiciary of a consistently subjective approach in all cases where determining counterfactual human decision-making is in question.

IV. Conclusions

There is nothing unique about causal doctrine in Scotland. The problems Scotland faces in developing its understanding about causation in the field of delict are shared by other jurisdictions throughout the world. It has been a little disappointing then that recent international academic debate in this field appears to have penetrated so little in to current judicial thinking. However, ways in which greater academic influence might be brought to bear on judicial thinking have been suggested in this chapter. Crucially, it has been argued that the superior NESS test ought to be presented to the courts in a simple, practicable and more relevant manner. Academic presentation of the test has perhaps been somewhat complex and seemingly esoteric in the past. This may explain the absence of reference to the test in reported decisions of the courts. In Scots law at least, there has also been a tendency in recent times to wait for the lead in developing causal doctrine to be shown by the English courts. In a jurisdiction like

Scotland, which gave birth to both the *Wardlaw v Bonnington Castings*³⁷ and *McGhee v National Coal Board*³⁸ decisions, it would be heartening to think that Scottish courts might once again be bold in their causal thinking and willing to blaze a trail. That of course presupposes a willingness first to revise thoroughly their causal ideas and terms. While cases where causation is the evident focus of the parties' dispute do not arise often, they are not so scarce that Scottish courts could not, if they so choose, be at the forefront of developing causal analysis in both Scotland and England.

³⁷ 1956 SC (HL) 26, [1956] AC 613.

³⁸ 1973 SC (HL) 37, 1973 SLT 14.